

BEFORE THE PUBLIC SAFETY OFFICERS STANDARDS AND TRAINING COUNCIL
STATE OF MONTANA

-----		Hearing Case No. 10-11
IN THE MATTER OF THE PROPOSED	)	
SUSPENSION OR REVOCATION OF THE	)	
CERTIFICATION OF:	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW AND
DANIEL M. DURYEE,	)	RECOMMENDED ACTION
RESPONDENT	)	

This matter came on for a hearing on the merits on April 1, 2013, in Helena, Montana. The hearing continued on April 2, 2013. Both parties rested their cases, gave closing arguments, and waived an opportunity to submit proposed findings of fact and conclusions of law.

WITNESSES

The following individuals testified on behalf of the prosecution branch of the Peace Officers Standards and Training Council (POST):

- Sergeant Mike Carlson, Deputy Sheriff, Lake County.
- Levi Read, Deputy Sheriff, Lake County.
- Steve Kendley, former Deputy Sheriff, Lake County.
- Clay Coker, current Acting Director of POST and the POST investigator who investigated allegations against Respondent.
- Jennifer Phillips, Respondent's ex-wife.
- Joyce Phillips, Jennifer's mother and Respondent's mother-in-law during their marriage.
- Patrick Phillips, Jennifer's father and Respondent's father-in-law during their marriage.
- Lorraine Lynch, long-time resident and business owner in Lake County.
- Scott Lynch, Lorraine's husband and long-time resident and business owner in Lake County.

The following individuals testified on behalf of Respondent:

- Jay Doyle, current Sheriff of Lake County, who appeared on behalf of Respondent without subpoena.

Respondent did not testify at hearing; however, his deposition was admitted into evidence and has been considered.

EXHIBITS

POST proffered sixty (60) exhibits. Respondent was provided a pre-hearing opportunity to object to any of the exhibits but did not do so. At hearing his counsel stated he had no objections to the exhibits and the exhibits were summarily admitted.

In addition, the following exhibits were admitted:

Post Exhibit 61, consisting of email exchanges regarding an incident involving Louis Shortman.

Exhibit A, offered by Respondent, consisting of a case report for the incident involving Louis Shortman. (This exhibit was admitted over the objection of POST's counsel.)

LIMITED CONSIDERATION GIVEN TO EXHIBITS

Lacking any objections by Respondent's attorney, all of the initial sixty exhibits should be deemed admitted for all purposes. However, many of the exhibits contain hearsay and other objectionable content if offered for unlimited purposes. Based on prior discussions in prior hearings, which are of record, it appears that many of the exhibits were offered in rebuttal to procedural contentions by Respondent's counsel. For example, Respondent's attorney contended that the investigation was deficient and that the prosecution in this matter is barred on account of a letter written by POST's Executive Director on September 13, 2010. (Ex. 16.) During hearings I indicated my intent to apply the Rules of Evidence in considering the exhibits. For example, I indicated that hearsay would be given no weight.

Therefore, In making my findings of fact regarding the *substantive allegations* against Respondent, I have considered only the testimony given at

trial and non-hearsay exhibits which relate to those allegations. In light of Clay Coker's testimony concerning the reasons for proceeding with a formal prosecution following the September 13, 2010 letter, my examination of investigative reports and statements obtained in the investigation has been cursory and those exhibits have **not** been considered with respect to the merits of the case.

In any event, the specific exhibits which figure in my findings are cited in my findings.

CASE RECORD AND CITATIONS

Pursuant to the agreement of counsel and a ***Scheduling and Procedural Order*** issued August 31, 2012, all pleadings, motions, briefs and other documents filed in this case have been maintained electronically in PDF format and all service has been by email. The docket is electronic and designated ***000 Duryee DOCKET***. The docket entries have been numbered beginning with 000 and the filing dates have been indicated. The file names listed in the docket correspond to the file names of the actual files; however, due to the fact that this hearing officer has served as his own secretary, some file names may be abbreviated and may not perfectly correspond to actual file names of the electronic files.

PROCEDURAL HISTORY OVERVIEW

A procedural history is a necessary preface. As reflected in my prior orders and transcripts of hearings in this case, the attorney for Respondent has obstructed discovery, failed to appear for scheduled hearings, and ignored and defied orders I have issued. He also failed to substantively respond to POST's motions for sanctions, summary judgment and in limine. His conduct in this case has caused me concern regarding the adequacy of his representation of Respondent and resulted in my granting great latitude in his presentation of Respondent's case at the hearing on the merits.

I have **not** attributed any of his counsel's improper conduct to Respondent. My goal has been to reach a fair and impartial decision with respect to the merits of the allegations against Respondent.

FINDINGS OF FACT

I. Procedural History

1. The original complaint in this proceeding was filed by Wayne Ternes, Executive Director of POST, on August 3, 2011. (001 Complaint.) Respondent has presented no evidence that Mr. Ternes was not in fact the properly appointed Executive Director of POST at the time the complaint was filed.

2. The complaint alleged that Respondent lied to fellow law enforcement officers and the public about being in the military and thereby violated a number of POST regulations. It also alleged that he was in possession of an unregistered and illegally converted machine gun.

3. The matter was initially assigned to another hearing officer.¹

4. On June 28, 2012, the undersigned hearing officer was designated by Mr. Ternes, as the Executive Director of POST, to act as "hearing officer" in POST proceedings. (000 Letter of Appointment of Hearing Examiner.)

5. At the time I was designated, this proceeding had already been assigned to Erin T. Inman for hearing. On August 14, 2012, Inman recused herself. (007 Inman Recusal.) I was requested to assume jurisdiction and did so on August 15, 2012. (008 Order re Further Proceedings and Setting Sch Conf.)

6. Thereafter, I held a telephonic scheduling conference with counsel for both parties. Following that conference, on August 31, 2013, I issued a **Scheduling and Procedural Order**. (010 Duryee Scheduling and Procedural Order.) The dates for completion of discovery, pretrial motions, the merits hearings, and submission of a pre-hearing order were set with the agreement of both counsel. (*Id.*)

¹ POST has used the term "Presiding Officer" for assigned hearing examiners. MAPA refers to them as "hearing examiners" and I have used the term "hearing officer." They are all one and the same.

7. As permitted by the scheduling order, an *Amended Complaint* was filed on September 26, 2012. (015 Amended Complaint.Duryee.)

8. The amended complaint was signed by Clay Coker as “Acting Executive Director” of POST. (*Id.*)

9. The only evidence presented at hearing concerning Clayton Coker's position was that he was appointed Acting Executive Director by the POST Council Chairperson.

10. The amended complaint is based on the same facts as the original complaint filed by Wayne Ternes. (Compare *001 Complaint* with *015 Amended Complaint.Duryee.*) Both are based on alleged lies about military service and possession of an illegal machine gun.

11. A history of Respondent's attorney's dilatory tactics, obstruction of discovery, and disregard of my orders in this case is set forth in my March 22, 2013, ***Decision Regarding Requested Discovery Sanctions.*** (072 2013.03.22 Decision re Sanctions.)

12. In addition to the conduct set forth in my March 22, 2013 decision, the pattern of dilatory tactics, obstruction of discovery, and outright defiance of my procedural orders by Respondent's attorney continued thereafter:

- Respondent's attorney failed to cooperate in setting up depositions I ordered be taken of witnesses he intended to call at hearing but had failed to disclose during written discovery. Moreover, he stonewalled attempts by POST's attorney to set up those depositions despite my orders that he cooperate. (065 2013.03.11 minute entry; 066 2013.03.11 Hearing Transcript; 078 2013.03.28 Renewed Motion in Limine and for Sanctions-1; 079 2013.03.28 Renewed Motion in Limine and for Sanctions BRIEF-1; 080 2013.03.29 Minute entry; 081 2013.03.29 Hearing Transcript.)
- Respondent's attorney failed to respond to the proposed pretrial order sent to him by POST's counsel, in violation of orders that he do so. (010 Duryee Scheduling and Procedural Order, ¶ 2.A.; 060 Order of February 26, 2013 – ¶ 6; 073 2013.03.25 Notice of Filing Proposed PTO; 075 2013.03.25 PPHO Email 3.15.13.)

- Respondent's attorney failed to appear at a March 29, 2013 pre-hearing conference. At the commencement of the merits hearing on April 1, 2013, he lamely said that he had been tied up on other matters and couldn't attend.
- Despite my prior orders requiring him to **finally** disclose **all** of his exhibits and provide summaries of witness testimony prior to hearing, at hearing Respondent's counsel offered new exhibits and testimony not previously identified.

13. Respondent, not his attorney, is on trial in this matter, a fact that I have noted continuously in hearings and prior orders. My concern is and has been the merits of the allegations against Respondent. I have admitted, to the extent it has been tendered, any evidence which bears upon the merits of his defense to those allegations, and provided every opportunity for Respondent to present his case despite the failures of his attorney.

II. Factual Issues Remaining for Decision

14. POST has abandoned its contentions regarding the machine gun; therefore, the only factual issues presented for decision are the nature and extent of Respondent's misrepresentations concerning prior military service and the effects of those misrepresentations. Respondent admits that he made statements that he had been in the military. He admits that he in fact never served in the military. However, he denies that he made many of the statements attributed to him or the statements he admitted making as of no consequence.

III. Testimony of Lorraine and Scott Lynch Disregarded

15. At hearing Lorraine Lynch testified as to an incident at their home which she said involved Respondent and further testified to a later conversation she said she had with then Sheriff Barron and Respondent. She testified that Respondent apologized for his conduct during the incident and that both Sheriff Barron and Respondent indicated that Respondent suffered from post traumatic stress syndrome stemming from his military service in Iraq. Lorraine's husband provided corroborating testimony concerning the incident but said he was not present at any meeting with Sheriff Barron and Respondent.

16. The substance of the Lynchs' testimony had been made known to Respondent, at least to his attorney, by way of discovery responses served prior to his deposition on December 5, 2012. It was presented to Respondent during his deposition and he was questioned about it. (Ex. 60, Duryee Depo. at 27-28, Depo. Ex. 5.)

17. At hearing Respondent called Jay Doyle, the current Sheriff of Lake County, on his behalf. Sheriff Doyle appeared voluntarily on behalf of Respondent and without being subpoenaed.

18. Through Sheriff Doyle, Respondent offered a report concerning the incident about which the Lynchs testified. The report, which was admitted as Exhibit A, indicates that Respondent was not involved in the incident at all; it thereby calls the Lynchs' credibility into question.

19. The exhibit was not identified at any time prior to trial. It was not listed in Respondent's exhibit list or disclosed to POST's counsel prior to its offer into evidence. It was not disclosed despite my Order of February 26, 2013 (060 Order of February 26, 2013), that ALL of Respondent's exhibits be identified:

With respect to the final lists of witnesses and exhibits to be exchanged and filed by March 1, 2013 [*August 31, 2012 Scheduling and Procedural Order*], Respondents [Duryee and Wasdworth] shall provide not only a complete list of witnesses they may call at the hearing in these matters but shall also provide a complete summary of all facts as to which each witness will testify. Further, Respondents shall list **all** exhibits they may offer at hearing and shall simultaneously provide POST's counsel with any and all exhibits that they have not previously provided, excepting only those exhibits which were provided by POST to Respondents in the first instance. Any witness not listed will be summarily excluded from testifying at hearing. Any testimony by a witness as to facts which are not identified will be summarily excluded at hearing. Any exhibits not identified and/or not provided to POST counsel as ordered herein will be excluded from evidence.

It was not disclosed in any pre-hearing order since Respondent's counsel, in violation of my prior orders, failed to respond to the proposed pretrial order submitted to him by POST's attorney and failed to appear at the pre-hearing

conference. Nor was it disclosed at the commencement of the hearing; indeed, when asked if he would have any exhibits Respondent's counsel responded that he would not.

20. Indeed, the exhibit had been requested by and faxed to Sheriff Doyle during the hearing while he was waiting to testify on behalf of Respondent.

21. Even more troubling was the fact that during his investigation Clay Coker sought all reports concerning the alleged incident. Coker testified that he contacted the Lake County Undersheriff Dan Yonkin and provided him with additional information to be used in searching for an incident report. Sheriff Doyle conceded at hearing that the information provided should have resulted in the identification and production of the report. The failure of the Sheriff's office to disclose the report in response to Mr. Coker's inquiries raises serious questions concerning the Sheriff's office's cooperation in the investigation and/or the authenticity of the report tendered at trial.

22. In the end, I admitted the exhibit and offered POST the opportunity to continue the hearing to allow it to engage in further discovery regarding the incident records. POST's counsel indicated her desire to bring this matter to a close rather than prolong the process.

23. In light of the exhibit and the questions surrounding it, I do not have enough information to judge the credibility of the Lynchs' testimony. I have therefore disregarded their testimony and base my following findings of fact on the testimony of other witnesses and exhibits.

III. Substantive Findings of Fact

A. Basic Background Facts

24. Respondent served as a deputy sheriff for Lake County from September 1998 (Ex. 6) until his resignation in December 2012 (Ex. 44²). At the time of his resignation he had the rank of sergeant.

25. Respondent holds the following POST certifications:

² Exhibit 44 is a copy of a news article dated December 31, 2012 and reporting Respondent's resignation. Respondent did not testify at hearing but his attorney represented in closing arguments that he had recently resigned.

Basic	November 19, 1998
Coroner Basic	February 15, 2001
Intermediate	May 16, 2002
Advanced	February 16, 2006
Supervisory	August 17, 2006

26. While serving as a deputy sheriff, Respondent told others that he had been in the military. Respondent does not deny he made statements claiming that he had been in the military, however, in a letter to his union sent following the initial investigation he asserted that it was a single instance and occurred when he had been drinking. (September 3, 2010 letter found in Ex. 21.) Despite his letter, in his deposition he admitted to claiming military experience “on more than one occasion” and further admitted that he may have claimed military experience on some occasions when he was not drinking, albeit in “casual conversation” and never while he was in uniform or on duty. (September Ex. 60, Duryee Depo. At 7- 10.) During his deposition he also admitted that he “may have” told Steve Kendley, who was also a deputy sheriff, that he had military experience and that it was possible he made such statement while on duty. (*Id.* at 35-36.)

27. Current Sheriff Jay Doyle testified on behalf of Respondent. He minimized Respondent's representations concerning prior military service, attributing one of Respondent's statements to drinking at a barbecue. However, his testimony corroborated other testimony that Respondent had in fact represented that he had been in the military. Sheriff Doyle verified testimony he gave in a deposition in another case in which he testified that Respondent had talked about a fellow platoon member had being killed and about being in in combat.³

³ The Sheriff testified during a deposition in another case about statements he heard Respondent make. He reaffirmed that testimony during cross-examination at the hearing in this case. His deposition testimony was as follows;

Q. During your employment with the Lake County Sheriff's Department, did Dan Duryee ever represent to you that he had been in the military?

A: He had.

B. Facts Pertaining to Investigation and Prosecution

28. In 2008 Levi Read, a fellow deputy sheriff, began questioning Respondent's claim that he had served in the military. Read searched reports on the internet and ultimately made a Freedom of Information Request which produced a response stating that Respondent had never been in the Military.

29. On October 12, 2008, Deputy Sheriff Sergeant Michael Carlson wrote a memo to then Sheriff Lucky Larson stating that some of the deputy sheriffs were questioning Respondent's claims regarding his military service and his SRT qualifications. (Ex. 38.) The memo apprised the Sheriff that a Freedom of Information Act inquiry into Respondent's military service had resulted in a response indicating that Respondent had not been in the military. (*Id.*)

30. Read was disciplined for using the sheriff's department computers in searching for information regarding Respondent's claims of military service, serving a one day suspension.

31. There is no evidence that Sheriff Larson took any disciplinary action against Respondent. Indeed, on May 24, 2010, Jay Doyle, the current Sheriff and then the Undersheriff for Lake County, wrote a letter in which he stated that the Sheriff's office had done an internal investigation and determined "[t]hat dating back as far as 2000, Sgt.. Duryee allowed, and ultimately, corroborated stories that were started about himself as a Marine." The letter stated that those involved in the investigation had concluded that it 'was "just a story"' and that "[t]here were no grounds for discipline at any level." (Ex. 10.)

Q. Do you recall when the first time was?

A. It was at a barbecue and he had been drinking. And he told me that he was assigned a reporter to be with his platoon or his unit or whatever and that the guy got killed and he felt bad.

...

Q. Did he ever tell you any other stories about being in the military?

A. The only one – and I don't – it had to have been in the military. The only other thing that I can remember is he had snuck up behind somebody and had to put a knife in their neck.

32. On March 31, 2010, POST received a written complaint addressed to Wayne Ternes, Executive Director, regarding Respondent's false claims of military service. (Exhibit 5.) An investigation was opened and conducted by Clayton Coker, the current acting Executive Director, who at that time was POST's investigator and compliance officer.

33. Mr. Coker interviewed numerous witnesses and on June 8, 2010 recommended "that POST Council consider revocation of Daniel Duryee's law enforcement certification." He went on to say that if POST did not concur in that recommendation then his secondary recommendation was "suspension . . . and a required psychological examination and a certification of mental fitness for duty before reinstatement." (Exhibit 11.)

34. Thereafter, at the request of Mr. Ternes, Respondent was evaluated by Dr. Christopher Nadasi, a psychologist, who concluded that Respondent "does not exhibit indications of acute or personality-based psycho-pathology.." He went on to state, "The examiner sees no reason based on psychological functioning this individual should be considered unfit for duty." (Ex. 13.)

35. With respect to Respondent claiming that he had been in the military, Dr. Nadasi observed:

With respect to his earlier false claims to have been a Marine, the examiner is inclined to accept Deputy Duryee's explanation that this action, and his missed opportunities to correct it, were representative of "immaturity" (rather than an indication of psychopathology.)

(Ex. 13.)

36. Based on Dr. Nadasi's letter, on September 13, 2010, Mr. Ternes wrote then Sheriff Lucky Larson. Referring to the request for a psychological evaluation, he stated:

Our office is in receipt of the information that we requested in the letter dated August 17, 2010.

From the information provided this office feels the issue surrounding the complaint about Deputy Duryee's statements of military service to be closed [sic] and that the doctor's opinion that Deputy Duryee is fit for duty satisfies the requirements of 7-32-303 2 (g), MCA.

However during the investigation of this complaint several additional allegations have been made which it is our understanding are continuing by other outside agencies, thus "POST" will be awaiting the outcomes of those investigations before we decide if further action by our office is warranted.

(Exhibit 16.)

37. Following that letter POST received a copy of a letter dated September 3, 2010, written by Respondent to his union. In it he claimed that on one occasion he had made a statement among friends, which he characterized as a "fish story," that he had been in the military. (Exhs. 19, 21.)

38. Respondent's letter was inconsistent with the information compiled in Mr. Coker's investigation. Mr. Coker testified that it raised questions as to Respondent's veracity and as to what he had told Dr. Nadasi.

39. In addition, POST thereafter received additional complaints regarding Respondent's military stories. (Coker testimony.)

40. In mid-March, 2011, Mr. Ternes contacted Dr. Nadasi about his concern that Respondent may not have made full disclosure regarding his statements claiming to have been a Marine. On March 22, 2011, he wrote to Dr. Nadasi. Of significance to the later decision to file a formal complaint against Respondent, he said:

[I]t was at my request that County Sheriff's Office have the [psychological] review conducted to ensure Mr. Duryee was "fit for duty."

This request came from a determination I made after a lengthy investigation into a complaint made against Mr. Duryee that he had consistently claimed to be a veteran of the United States Marine Corps. At the conclusion of

this investigation I questioned Mr. Duryee's mental status and requested the review.

The Lake County Sheriff's Office did have the review completed as requested and forwarded us the findings. I would normally have accepted these findings of "fit for duty" and closed the file; however after our conversation where you stated that you "make your findings based on information from the client and agency" I felt that you may not have been given all the information that we have concerning this individual. My concern with the findings is that Mr. Duryee's claim of being in the military was written off as "immaturity."

(Ex. 23.) Mr. Ternes enclosed Mr. Coker's June 8, 2010 investigative report (Ex. 11); Dr. Nadasi's August 27, 2010 letter (Ex. 13) and Respondent's letter to the union (Ex. 21).

41. On June 7, 2011, POST received an additional complaint from Brian Kunz, who stated he had been employed for seven years as a communications officer and had been a reserve deputy beginning in 2004. Mr. Kunz related a conversation he said he had with Respondent in which Respondent claimed to have been "a U.S. Marine Corps gunnery sergeant in Iraq during the first Gulf War" and that he had "seen combat, lost members of his unit in battle, and had killed enemy combatants." (Ex. 25.)

42. Thereafter, on August 3, 2011, Mr. Ternes, in his capacity as the Executive Director of POST, filed the initial complaint in this matter. Mr. Coker testified that the factors leading to the decision to proceed with a formal complaint were (1) the inconsistency between the information gleaned from the investigation and Respondent's claim that he told a "fish story" on a single occasion and (2) later, additional information provided by other persons indicating that Respondent's military service claims were much broader. Mr. Coker's testimony was uncontradicted and credible. I find that the reasons provided were in fact the justification for filing the formal complaint and proceeding with the present proceeding against Respondent.

C. Facts Pertaining to Respondent's Statements Regarding Military Service

43. Two current Lake County deputy sheriffs and one former deputy sheriff testified at hearing, along with Respondent's former wife and parents-in-law. Their testimony was credible and persuades me that Respondent's statements regarding military service were much more extensive than he claims and that some of them were made while in uniform and on duty.⁴ I did not have an opportunity to personally assess the credibility of the Respondent as he declined to testify. I did, however, consider his deposition testimony.

44. Specifically, I find that over the years after he became a deputy sheriff and continuing until 2008, he represented to some of his fellow officers, to his wife, and to his in-laws that:

- he had served in the Marine Corps during the first Gulf War;
- he had been involved in combat during the Gulf War;
- others in his unit had died during combat while he was present and that one of his best friends had been killed in a combat operation in which he had been involved;
- a scar on his arm was the result of a napalm wound suffered during the war; and,
- he suffered from post traumatic stress syndrome (PTSD).

45. After Lake County Deputy Sheriff Mike Carlson killed a man in the line of duty in 2002, Respondent consoled him by telling him that he had killed people while in the Gulf War.

46. The statements were made over a period of years and made both on and off duty.

47. Respondent's statements led other deputy sheriffs to believe that Respondent had in fact been in the Marines and had been in combat in Iraq.

⁴ In making my substantive findings regarding Respondent's statements, I have not considered written statements and reports of others which are contained in the exhibits and have not even read most of them.

Their beliefs continued until at least 2008, at which time Respondent's claims of military service were questioned by one of his fellow deputy sheriffs.

48. Respondent served on the Lake County Special Response Team ("SRT"). Appointment to the team required the unanimous vote of current team members. Other than his claim of military and combat experience, Respondent had no SWAT (Special Weapons and Tactical) training and to this date has had no SWAT training. However, SWAT training was not a prerequisite for SRT selection and there is insufficient evidence to persuade me that his initial election to the SRT was predicated in whole or in part upon his claims of prior military experience.

49. The Lake County SRT has a commander and two team leaders under the commander. The commander and the team leaders are elected by fellow SRT members and the votes must be unanimous.

50. While serving on the SRT, Respondent was unanimously elected a team leader over another contender for the position. The incumbent team leader urged the members to vote for Respondent on account of his military experience.⁵ At least some of the members voted for him on account of their belief that he had military and combat experience.

51. There is insufficient evidence (e.g. payroll records) for me to conclude that Respondent received additional compensation in the form of a salary increase for his role as SRT team leader. There is sufficient testimony that he received additional overtime pay on account of team leader responsibilities for training SRT members. The magnitude of the any additional pay, however, is speculative.

52. Sergeant Mike Carlson resigned from the SRT because of his lack of confidence in Respondent after he learned Respondent did not have military service and because of Respondent's lack of SWAT training.

⁵ Evidence of what was said at the meeting was admitted to show what was said, not whether it was in fact true, which it turns out it was not. However, the statements by the incumbent team leader reflect statements made by Respondent over the years and the beliefs of at least some of the SRT members.

53. Respondent's misrepresentations concerning military service have created a rift among deputies in the Lake County Sheriff's Department, distrust among officers, and fear of retaliation among some deputies.

54. Respondent's misrepresentations, i.e., *lies*, concerning military service have been reported publicly (see exhs. 18, 21 and 44), and some local citizens of Lake County formed a citizens group questioning the integrity of the Lake County Sheriff's office and submitted letters and statements expressing concern and distrust arising from Respondent's lies (see ex. 21). It is common sense and a compelling inference that a law enforcement officer's lies about serving in the military will raise questions in the minds of the public as to a officer's honesty and integrity and will undermine public confidence in the law enforcement agency, and I so find. Such lies raise questions as to the office's character and truthfulness.

CONCLUSIONS OF LAW

1) The Peace Officers Standards and Training Council ("POST") is a state agency established by statute. Section 2-15-2029 (1)(a), MCA, provides:

1) (a) There is a Montana public safety officer standards and training council. The council is a quasi-judicial board .

2) POST is empowered to "provide for the certification and recertification of public safety officers and for the suspension or revocation of public safety officers." § 44-4-403(c), MCA.

3) As an administrative agency, POST has only those powers expressly granted by statute. ***Auto Parts of Bozeman v. Employment Relations Division Uninsured Employers' Fund***, 2001 MT 72, ¶ 38, 305 Mont. 40, 23 P.3d 193.

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4) Citing section 44-4-403(3), MCA (2011),⁶ Respondent insists that a contested case hearing can only be held **after** his POST certificate is revoked or suspended, an ironic argument if there ever was one, since it would require POST, without opportunity for a hearing, to revoke or suspend his certification in the first instance and put the burden on Respondent to challenge its action after-the-fact.

5) Respondent's argument overlooks another statutory provision which expressly and more broadly empowers the POST Council to **"provide . . . for the suspension or revocation of certification of public safety officers."** § 44-4-403(1)(c), MCA.⁷

6) POST is expressly authorized to adopt rules implementing its statutory powers and duties. Section 2-15-2019(2), MCA, provides:

(2) The council may adopt rules to implement the provisions of Title 44, chapter 4, part 4. Rules must be adopted pursuant to the Montana Administrative Procedure Act.

7) POST has in fact adopted a rule providing formal procedures for the suspension and revocation of a public safety officer's certification. That rule, overlooked by Respondent, is ARM 23.13.704, which provides:

**COMMENCEMENT OF FORMAL PROCEEDINGS FOR
SUSPENSION OR REVOCATION OF CERTIFICATION**

(1) Formal proceedings may be commenced only after the filing of a complaint as described in these rules, the director's determination that formal proceedings are necessary, the

⁶ Section 44-403(3), MCA (2011), provides in relevant part:

(3) A person who has been denied certification or recertification **or whose certification or recertification has been suspended or revoked is entitled to a contested case hearing before the council pursuant to Title 2, chapter 4, part 6** (Emphasis added.)

⁷ The subsection provides in full:

44-4-403. Council duties -- determinations -- appeals. (1) The council shall:

...
(c) provide for the certification or recertification of public safety officers *and for the suspension or revocation of certification of public safety officers.* (Italics added for emphasis.)

designation of a presiding officer, and the issuance of a written order to show cause, and notice of opportunity for hearing.

(2) Formal proceedings for suspension or revocation are subject to the Montana Administrative Procedure Act, and must be conducted pursuant to that act.

(3) In formal proceedings, the respondent must file an answer, or be in default. The answer shall contain at least a statement of grounds of opposition to each allegation of the complaint which the respondent opposes.

(4) Service shall be made in a manner consistent with Montana law.

(5) If a review of the conduct of a person holding a certificate subject to revocation or suspension under these rules is pending before any court, council, tribunal, or agency, the director may, in their discretion, stay any proceedings for revocation and suspension pending before the council.

(6) In the event the respondent fails to answer, appear, or otherwise defend a complaint against them of which the respondent had notice, the presiding officer may enter an order containing findings of fact, conclusions of law, and an opinion in accordance with the Montana Administrative Procedure Act, Montana Rules of Civil Procedure, and/or any other rule of law applicable.

(7) Any party may represent themselves, or may at their own expense be represented by an attorney licensed to practice law in the state.

(8) A representative from the office of the Attorney General may present the case of the complainant.

(9) The presiding officer may utilize a legal advisor to assist in conducting the hearing. If the presiding officer's legal advisor is employed by the office of the Attorney General, their contact with the representative from the office of the Attorney General who presents the case of the petitioner shall be restricted to that permitted by law.

(10) Unless required for disposition of ex parte matters authorized by law, after issuance of notice of hearing, the presiding officer may not communicate with any party or their representative in connection with any issue of fact or law in such case, except upon notice and opportunity for all parties to participate.

8) Pursuant to the forgoing rule, the POST Council determined that the due process afforded through a contested case proceeding should apply **before** any certificate is revoked or suspended, **a protection that benefits public safety officers and benefits Respondent**. Providing greater protection to public safety officers under broad authority to provide rules and procedures for suspension and revocation of certificates is **not** inconsistent with or in derogation of section 44-4-403(3), MCA. The two sections must be construed together and harmonized. *Stockman Bank of Mont. v. Mon-Kota, Inc.*, 2008 MT 74, ¶ 31, 342 Mont. 115, 180 P.3d 1125.

9) Section 2-15-2029 (1) (b), MCA, authorizes the POST Council to “hire its own personnel and independently administer the conduct of its business” POST Council in ARM 23.3.703 has provided for a director and authorized the director or designee to investigate complaints, ARM 23.3.703 (4), and for the director to “file a formal complaint with the council on their own behalf,” ARM 23.3.703 (5)(a).

10) The initial complaint in this matter was filed by Wayne Ternes as executive director of POST and no evidence has been presented to show that he was in fact not the duly appointed director.⁸

11) The amended complaint was executed by Clayton Coker as “Acting Executive Director.” No evidence or law was presented to show that he is in fact not duly designated by the POST Council as the acting director; in any event the amended complaint does not change the basic allegations in the original complaint.

⁸ Assertions by Respondent’s attorney made at various times that the director must be appointed by the Governor are contrary to statute and spurious.

12) Based on the Ternes letter of September 13, 2010 (Ex. 13 and see Finding 33), Respondent contends that the prosecution of the complaint in this matter is barred. He cites no authority for his contention and I can find none. The Director was acting in a prosecutorial role and exercising prosecutorial discretion. An initial decision not to move forward and not prosecute does not bar a later decision to prosecute. Prosecutorial discretion is especially important given the fact that later events, analysis, and/or information may be brought to light which warrants a change of mind; that indeed was the situation in this case. I therefore conclude that the Respondent's contention is without legal merit.

13) As previously noted, POST has adopted a rule providing for appointment of a presiding officer and application of the Montana Administrative Rules of Procedure (MAPA) to any proceeding to revoke or suspend a peace officer's certification. (ARM 23.13.704 (1) and (2).) MAPA refers to hearing examiners and expressly provides for any agency to "appoint a hearing examiners for the conduct of hearings in contested case hearings."⁹ Reference in ARM 23.13.704(1) to "presiding officer", in conjunction with the incorporation of MAPA through ARM 23.13.704(2) indicates that "presiding officer" and "hearing examiner" refer to the same official.

14) The present proceeding is plainly a "contested case proceeding" subject to MAPA. Section 2-4-102 (4), MCA defines a contested case proceeding as "a proceeding before an agency in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing."

15) MAPA provisions provide basic procedural rules and protections with respect to those proceedings. §§ 2-4-611, 612, MCA.

⁹ The statute also states, "A hearing examiner must be assigned with due regard to the expertise required for the particular matter." The undersigned hearing examiner practiced law for over 35 year; has judicial experience, having served 12 years as the Montana Workers' Compensation Judge; has five years experience as a Montana Assistant Attorney General; has experience in representing law enforcement officers and agencies, focusing on 42 USC § 1983 claims; and has extensive experience in employment matters.

16) Respondent has correctly noted that the POST Council has not adopted “rules of practice for discovery prior to a contested case hearing” as required by section 2-4-602, MCA (2011).¹⁰ The rules of practice most commonly adopted by Montana agencies are the Model Rules of the Attorney General, ARM 1.3.101 et seq. But even lacking adoption of formal procedural rules, an agency and its hearing examiner have inherent authority to regulate proceedings in a contested case matter. As one district judge has noted:

Although the Board [of Horse Racing] has not specifically provided authority to hearing examiners to enter scheduling orders, **hearing examiners necessarily must have that authority to control discovery and other pretrial matters.** Otherwise it would be possible for a party to request discovery on the eve of trial. Therefore, the power for a hearing examiner to enter a scheduling order must be inferred from the Board's authority to provide for discovery. (Emphasis added.)

Haven v. Board of Horse Racing, 2004 ML 100, 2004 Mont. Dist. Lexis 2006, ¶ 12 (Honzel, District Judge).

17) The Amended Complaint, as well as the Complaint, allege that Respondent's false claims of prior military service violate regulations applicable to public safety officers, specifically subsection (a), (g), (h) and (k) of ARM 23.3.702 (2). The ARM section provides in relevant part:

(2) The grounds for sanction, suspension, or revocation of the certification of public safety officers are as follows:

(a) willful falsification of material information in conjunction with official duties;

. . .

(g) willful violation of the code of ethics set forth in these rules;

¹⁰ To avoid future controversy it would behoove the POST Council to formally adopt rules of procedure for future contested case hearings. The Model Rules of the Attorney General are an obvious source for such rules.

(h) other conduct or a pattern of conduct which tends to significantly undermine public confidence in the profession;

...

(k) acts that are reasonably identified or regarded as so improper or inappropriate that by their nature and in their context are harmful to the agency's or officer's reputations.

18) Respondent's representations concerning prior military service violated ARM 23.3.702(2)(a). His prior military service was relevant to his election as an SRT and to his SRT qualifications. The confidence the SRT team members placed in him in unanimously electing him to team leader without any SWAT training was in part predicated on the lies that he initiated and perpetuated about his prior military experience.

19) Respondent's false claims of military service violated the code of ethics, which are set forth in ARM 23.13.20(3), specifically the last paragraph which states: "I will at all times ensure that my character and conduct is admirable and will not bring discredit to my community, my agency, or my chosen profession." His claims that he had been in the military were lies. They brought his honesty and integrity into question, and have brought discredit to his community, his agency and his profession. In this regard I take special note of national concern over false claims of military service, a concern that is reflected in the Stolen Valor Act, 18 U.S.C. 704, enacted in 2006, which made it a crime for any person who:

knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barter, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law,

While the law dealt specifically with misrepresentations concerning awards of military medals and was subsequently declared unconstitutional as a violation of the First Amendment to the United States Constitution, ***United States v. Alvarez***, 132 S. Ct. 2537; 183 L. Ed. 2d 574; 2012 U.S. LEXIS 4879, it reflects an overall condemnation of false claims regarding military service. In other words, falsely claiming prior military service is **not** a trivial matter. I conclude that Respondent's false claims of military service were willful and violated the code of ethics he agreed to follow.

20) I further conclude that Respondent's false claims also "amounted to a pattern of conduct which tends to significantly undermine public confidence in the profession" and that they were also "improper or inappropriate that by their nature and in their context are harmful to the agency's or officer's reputations." ARM 23.3.702 (2) (h) & (k). Law enforcement officers are constantly called upon to testify in the courts. Their honesty is essential to their credibility, as well public confidence in their actions. False claims such as those made by Respondent are fodder for attacks on his honesty and truthfulness. They bring public scrutiny upon not only the officer but the agency and public discord, as demonstrated by the evidence in this case.

21) At the close of the evidence in this case, Respondent's attorney filed a written motion to dismiss. I denied the motion orally and reaffirm my denial here. My foregoing conclusions of law address the contentions made in the motion.

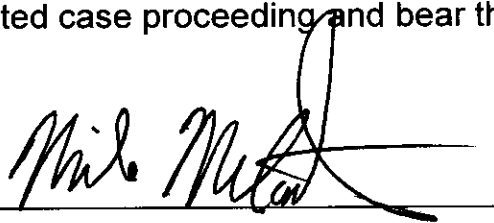
RECOMMENDED ACTION

Based on the evidence presented in this case, my findings of fact and my conclusions of law, I recommend that the POST Council revoke all of the Respondent's certifications. The strongest argument for not doing so was actually presented by Respondent's attorney in his closing argument, in which he stated that Respondent was taking responsibility for his actions by resigning from the Lake County Sheriff's Office and seeking alternative employment. That argument,

however, was unsupported by any evidence of Respondent's reasons for resigning and there is little in the record to show remorse; indeed, his letter to the union and his deposition show that he has failed to acknowledge and take responsibility for his lies and draw into question his honesty and integrity in responding to the charges against him.

Respondent's attorney has consistently attacked the present proceedings because the Council, without any contested case hearing, did not **first** revoke or suspend Respondent's POST certificates. In the event the Council or any Court concludes that the Council must first revoke or suspend the certificate of a public safety officer prior to triggering a contested case proceeding, then I recommend that the Council immediately revoke the Respondent's certificates and place the burden upon him to initiate a further contested case proceeding and bear the burden of proof in that proceeding.

DATED this 9th day of April, 2013.

A handwritten signature in black ink, appearing to read "Mike McCarter", is written over a horizontal line.

MIKE McCARTER, Hearing Officer

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